In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

STATEMENT OF JURISDICTION

The Appellants submit to the Court their statement of Jurisdiction and first give a brief history of the facts previous to filing this case, on which this suit was predicated, as follows:

Appellants are Indians, Wards of the United States Government, living on the Fort Hall Indian Reservation, in Idaho, under the supervision of the Department of the Interior, office of Indian Affairs and are sole heirs at law of Washington Pocatello and Minnie Pocatello. Deceased Washington died on or about the 27th day of April, 1917, at Fort Hall, and Minnie Po-

catello his wife died on the 28th day of May, 1928, at Fort Hall, Idaho. That neither Washington Pocatello or Minnie Pocatello had received a certificate of Competency from the United States Government at any time during their lifetime and was at all times mentioned in this suit, wards of the United States Government living under Indian tribal relations on the Fort Hall Indian Reservation. That an Indian Woman of the name of Yaotes Owa received a patent dated May 31st, 1884, from the United States Government for the 80 acres of land involved in this suit, located in Box Elder County, Utah. That Yaotes Owa died in the late 80's no probate proceedings were taken to determine heirship and right of distribution of the Estate of Yaotes Owa until February 1917. That in February 1917 one, Albert Sailor, believing that Washington Pocatello, was the only surviving heir of Yaotes Owa, located Washington Pocatello on the Fort Hall Indian Reservation, and on the 2d day of February secured from Washington Pocatello and Minnie Pocatello, his wife, a warranty deed to the full 80 acres involved in this suit, to one U. F. Diteman, a white person, for a consideration of $3200.00. $200.00 cash and the balance to be paid $300.00 a year on the 20th day of December each year until the full sum of $3000.00 would be paid. The last payment to be made on December 20, 1926. Said deed was placed in Escrow in the First National Bank of Pocatello, Idaho, not to be delivered until the full $3000.00 was paid to said Bank for the use and benefit of said Washington Pocatello. Probate proceedings were later commenced in the District Court of Box Elder County, Utah, to determine the heirship to, and distribution of the estate of Yaotes Owa. The

terms of the escrow agreement was written on the back of the envelope that the deed was placed in. On the 18th day of April, 1917, the Cashier of the First National Bank of Pocatello, Idaho, executed a certificate describing the terms of the escrow, and said certificate was filed of record in the County Record of Box Elder County, Utah, on the 19th day of April, 1917. This Affidavit was pleaded in plaintiff complaint verbatim and its making and filing of record was admitted by respondents and the full text of said affidavit is copied by the District Court into its finding No. 7. (Transcript 0317).

Washington Pocatello died on the 27th day of April 1917.

On the 7th day of November, 1919, the District Judge of the District Court of Box Elder County, Utah, made and entered two decrees of distribution of the same identical 80 acres of land, one in the estate of Yaotes Owa, deceased and one in the estate of Janes and Jane Brown, deceased, decreeing an undivided two-thirds in the said 80 acres of land to an Indian of the name of James S. Brown, and the other undivided one-third interest in the said 80 acres of land to the estate of Washington Pocatello, deceased, both decrees were filed of record in Box Elder County, Utah, on the 8th day of November, 1919. It is admitted by respondents and found by the court that U. F. Diteman or A. I. Grover secured the deed of Washington Pocatello from the First National Bank of Pocatello, Idaho, the Escrow Holder and filed the same of record in Box Elder County, Utah, on the 10th day of November, 1919, at

4:00 P. M. two days after the decrees were entered. This fact is admitted by the respondents and found to be a fact in the district courts Finding No. 9 a true copy of said Finding No. 9 is copied into Appellants assignments of error, and herein after set out in full in this statement. The said A. I. Grover took possession of, and claimed ownership to the said undivided one-third interest decreed to the estate of Washington Pocatello, deceased, by virtue of the deed secured from the escrow holder, and exercised control over the said undivided one-third interest, and received all the rents and profits, took them to himself until in March, 1925, when A. I. Grover and his wife conveyed the entire 80 acres to the respondents in this suit.

On December 3, 1919, one Charles E. Foxley petitioned the District Court of Box Elder County, Utah, to be appointed administrator of the estate of Washington Pocatello, deceased, and the said District Court did on the 12th day of January, 1920 appoint the said Charles E. Foxley administrator of the estate of Washington Pocatello, deceased, and said Charles E. Foxley qualified as Administrator of the estate of Washington Pocatello, deceased, all of which facts are to be found set forth as true in Finding No. 9 of the District Court in this suit, a copy of said Findings is set forth in Appellants specification of errors and also herein after set forth in full. Soon after his appointment the said administrator sent a certified copy of his letter of administration to the First National Bank of Pocatello, Idaho, and the said bank delivered to the said administrator the money paid to the bank by the said U. F. Diteman or A. I. Grover amounting to the

sum of $995.00, and the said administrator without filing any inventory or appraisement of any property in the estate of Washington Pocatello, deceased, did on the 3rd day of March, 1921, filed in the District Court of the First Judicial District of the State of Utah for and in the County of Box Elder, in the matter of the estate of Washington Pocatello, deceased, a final account, and petition for settlement, thereof, reporting to said District Court that he had received from the First National Bank of Pocatello, Idaho, $995.00, which had been paid into said bank upon land contract for sale of the E 1/2 of the S. E. 1/4 of Section 12, T. 11. N. R. 3 west S. L. M., that had been executed by Washington Pocatello and wife prior to the death of Washington Pocatello, and placed in escrow, and that $504.00 of this amount was due to him as attorney fees.

The said Administrator, Charles E. Foxley, at the same time that he filed his account as Administrator of the estate of Washington Pocatello, deceased, with the District Court of Box Elder County, Utah,on March 3, 1921, he filed his petition for distribution of the estate of Washington Pocatello, deceased, naming the Appellants, herein, as the rightful heirs to have said estate distributed to and asked, and prayed the court to appoint a date of hearing upon said account and upon said petition for distribution. The clerk of said Court did on the 3rd day of March, 1921, set a date for hearing on said final account and petition for distribution of the Estate of Washington Pocatello, deceased, to be held on Monday the 14th day of March, 1921, at 10:00 A. M. before the District Judge of the District Court of the First Judicial District in and for the County of Box Elder, in the County Court House, in the Court Room,

of said court in Brigham City, Box Elder County, that the said District Court did not hold said hearing at the time and place appointed and the Judge of said District Court entered a number of orders of continuance of said hearing the last order of continuance being made on the 9th day of January, 1922, fixing the 13th day of February, 1922, at 10:00 A. M. at the court room of said Court, in Brigham City, in said Box Elder County, Utah, for the time and place for a hearing on said final account and petition for distribution. That said District Court failed to hold a hearing on the said matter, and failed, refused and neglected to fix another date for said hearing, and failed, refused and neglected to ever fix another date, or hold a hearing on the final account and petition for distribution of Charles E. Foxley the administrator of the estate of Washington Pocatello deceased, and no action of any manner was taken by the District Court of Box Elder County, upon the estate of Washington Pocatello, deceased, at any time during the twenty years until the Appellants, the heirs at law of the said estate filed this action. The District Court of Box Elder County, Utah, having failed, refused, and neglected to hold a hearing on final account and petition for Distribution filed in said court by the administrator, Charles E. Foxley, the administrator some years subsequent, left the State of Utah for parts unknown and took the full sum of the $995.00 that he reported he received for the deed of Washington Pocatello, to himself, and no action during the twenty years was taken by the District Court in the matter of the Estate of Washington Pocatello, deceased until this suit was filed to quiet title to the undivided one-third interest in said 80 acres of land on the ground there

was no valid delivery of the Washington Pocatello deed, and for accounting for the rents and profits, due to said estate from said undivided one-third interest.

The District Court of the First Juicial District of the State of Utah in and for Box Elder County, the same court wherein the administration of the Estate of Washington Pocatello, deceased, had stood for 20 years without attention heard the case at Bar, and made exhaustive findings of facts, which, in substance held that the burden was upon the appellant to prove positively that the full sum of $3000.00 expressed in the escrow agreement was not paid to the escrow holder and that the burden was upon the appellants to prove by positive evidence that the deed was not wrongfully delivered and that for reason of the failure of the plaintiff to prove positively those facts to the satisfaction of the court, that the court was going to hold that by reason the said deed which on its face recited a consideration at thirty two hundred dollars was regularly filed for record in the office of the county recorder of Box Elder County, Utah, on November 10th, 1919, that there was a valid delivery of the deed. (See Finding 9 transcript 0317).

Appellants appealed from the decision of the lower Court to the Supreme Court of the State of Utah which is the highest court in the State of Utah. The Supreme Court of the State of Utah by its decision filed April 18, 1941, affirmed the decision and judgment of the trial court and Appellants have no further recourse other than to the Supreme Court of the United States and appellants believe that the United States Supreme

Court has jurisdiction in the case for the following reasons:

1. That the courts of the State of Utah have denied to the Appellants the heirs of Washington Pocatello, deceased, who it is admitted by the respondents throughout all the proceedings and found to be a fact by the trial court and the decision of the Supreme Court of the State of Utah are Indians, residents on the Fort Hall Indian Reservation in Idaho, wards of the Government of the United States, and that the respondents are white persons, residents of the State of Utah. That said courts of Utah, the trial court during the trial and the Supreme Court on the appeal denied the said appellants, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, the heirs of Washington Pocatello, deceased, a right and privilege accorded to them and enacted for their benefit and protection by the Congress of the United States which enacted the following quoted Statute for the protection of Indians:

> "Trial of Right of Property; Burden of Proof: In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."
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> Act of Congress, June 30, 1834, c 161, Sec. 22, 4 Stat, 763, R. S. Sec. 2125, U. C. Code Compact Edition, Sec. U. S. A. C. Vol. 25, 194.

This Federal Statute was presented by Appellants to the Trial Court, argued by counsel for Appellants and set out verbatim in Appellants brief to the Trial Court in this case, before the Trial Court rendered its decision.

Despite the fact that this Statute was forcibly brought to the Trial Courts attenion, the Trial Court in the commencement of the courts Finding No. 9, (transcript 0317) in violation of this statute and in violation of the rule of law that has existed for 400 years, that when it is shown that a deed transferring real property was placed in escrow and it is pleaded and asserted that there was a wrongful delivery of that deed, then the burden of proof immediately shifts to the party, or parties claiming under that deed, to prove, to the court a valid delivery of the deed. The Trial Court wrongfully placed those burdens entirely upon the appellants, Indians, non-residents of the State of Utah and thereby relieved the respondents, white persons, of the State of Utah from those burdens, wherein the Trial Court found in said Finding No. 9 (Transcript 0317) as follows:

> "That the plaintiffs offered no evidence at the trial of said cause to the effect that U. F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself, or with one A. I. Grover, wrongfully, unlawfully, corruptly and intentionally, with the intent to defraud the Estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said Escrow Holder only $1000.00 on the

purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiffs offered no testimony that at the time of the delivery of said Deed, the said U. F. Diteman and A. I. Grover and said depositary Bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; The Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said Deed which on its face recited a consideration of $3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4:00 P. M., in Book 15 of Deeds at page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for

record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919 claim ownership of said lands, that said Deed was not void but was a valid Deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said bank was not fraudulent; the Court further finds that although Washington Pocatello had title before the property was decreed to his estate that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741 Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein."

This finding placing this burden upon the Appellants is contrary to general law under the facts disclosed by the judgment roll in this case and did deny to the Appellants the rights and privileges guaranteed to them by the United States Statute heretofore set out. This Statute was by Appellants brought to the attention of the Trial Court both by brief and argument before the Court made its findings.

The Supreme Court, of the State of Utah, did in the last six paragraphs of its decision and especially in paragraphs 6 and 7 sustain and affirm every finding that the district court made in its Finding No. 9.

The foregoing quoted United States Statute was distinctly brought to the attention of the Supreme Court of the State of Utah by argument on behalf of the Appellant and by citing and quoting the same in Appellants reply brief filed with said Supreme Court previous to the matter being set down for argument the Appellants on page 27, of said Appellants reply brief said and quoted to the Supreme Court of the State of Utah, as follows:

> "It being admitted that the plaintiffs were, and are, full-blooded Indians, and Wards of the Government, and it was shown that they were not only the presumed owners of the undivided one-third interest in the land, but the legal owners, the burden is placed upon the white man that claims that property to prove good title to it, and we quote the United States Statute on his point, verbatim to said Court.

That Appellants contend that the Supreme Court of the State of Utah, by sustaining and affirming such an erroneous finding as was found by the District Court in Finding No. 9, the Supreme Court of the State of Utah denied to Appellants the rights and privileges granted to them by the Statute of the United States, herein before quoted, and furthermore by such finding and ruling denied to the Appellants the equal protection of the laws for the reason that it being absolutely

admitted and recognized throughout all of the proceedings in this suit that the deed of Washington Pocatello was placed in Escrow and valid delivery of that deed was certainly shown by the Appellants to be invalid delivery the said findings of the District Court is contrary to law and is unjust taking of a valuable property right from these Indians, wards of the Government, non-residents of Utah and given the same to white persons, residents of the State of Utah.

Appellants have been unable so far to find any case where either the Supreme Court of the United States or a Supreme Court of any State has directly passed upon this Statute of the United States but it is obvious on its face that it is a plain and emphatic Statute. That it was enacted by the Congress of the United States as a public policy Statute, for the protection of Indians who are universally recognized not to be conversant with the laws and conduct of the white person. The only comment or citation that Appellants were able to find applying to this section is an annotation to Section 194, Vol 25, U. S. A. C., which is the Statute in question, is an opinion of the Attorney General of the United States which reads as follows:

> "Policy evidence by the Statute:
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> "This section is evidence of the Policy of the Government to give Indians the benefit of the doubt on questions of fact or construction of treaties or Statutes to their welfare."
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> 34 Op. Atty. Gen. p 439 (1925).

2. That Appellants pleaded and it is conceded throughout all the proceedings by respondent and found by the Trial Court in its Findings of Fact Nos. 2 and 3 that the Appellants, heirs of Washington Pocatello, deceased, and that Washington Pocatello and Minne Pocatello, his wife, were full blooded Indians, wards of the Government, residing at the Fort Hall Indian Reservation in Idaho, and the Supreme Court in the 3rd paragraph of its decision held in part as follows:

> "Plaintiffs' intestates were Shoshone Indians residing on the Fort Hall Indian Reservation in Idaho. The tract of land in question was not allotted land but was acquired by the ancestry of Washington Pocatello, one Yaotes Owa, through homesteading of the land and the issuance of patent from the United States. Yaotes Owa died in Box Elder County, Utah, in the late eighties."

And then again the Supreme Court of the State of Utah second last paragraph of its decision holds as follows:

> "Appellant questions whether Washington Pocatello and Minnie Pocatello, being Indian wards of the Government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under Congressional enactment, there were restrictions upon alienation, had long since passed at the time of the transaction. As far as revealed by the judgment roll any other conditions prescribed by law re-

quisite to a valid contract by such Indians may have been -- if at all applicable -- complied with."

It was and is the Appellants contention that Washington Pocatello and Minnie Pocatello, being Indians, incompetent Wards of the United States Government could only make a deed to the said premises in the first instance under the rules and regulations of the Secretary of Interior and under, and by the approval of the Secretary of Interior, and Appellants contended throughout the trial and hearing on appeal by argument and setting forth in their briefs the different United States Statutes hereinafter enumerated in support of said contention. That the Courts of the State of Utah, by finding that the Deed of Washington Pocatello and Minnie Pocatello was valid and although delivered long after Washington Pocatello's death its recording made a valid delivery and valid deed, and held that it related back to the time of its execution, and thereby, cut off the rights of the heirs of Washington Pocatello from a valid property right, was denying to and depriving these Appllants, the heirs of Washington Pocatello and Minnie Pocatello a right and privilege extended to them by the laws of the United States, and taking a valuable property right from them, in violation of their Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States.

Appellants herein set forth the United States Statutes, and authority, that Appellants briefed and argued to the Supreme Court of the State of Utah, as follows:

(The Congress of the United States on March 3, 1871, passed an act that is still Supreme law in every state in the United States, as follows:)

"No agreement shall be made by any person with any tribe of Indians, or individual Indians, not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians, relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or things, under laws or treaties with the United States, in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First: Such Agreement shall be in writing, and a duplicate of it delivered to each party.

"Second: It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior of Indian Affairs endorsed upon it."

(There are a number of other provisions contained in the act that we have omitted, but quote the last Section of the Act.)

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or Tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such ser-

vices, may be recovered by suit in the name of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Act of Congress, March 3, 1871, c. 120, Sec. 3, 16 Stat. 570, U. S. Code, Compact Edition, Sec. 81. U. S. A. C. Vol. 25, 81.

The land involved in the Washington Pocatello Deed was inherited land, and Congress passed another Act on May 27th, 1902, which provides as follows:

"The adult heirs of a deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the Guardian, **but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."**

Act of Congress, May 27th, 1902, c. 88, Sec. 7, 32 Stat. 275; U. S. Code Compact Edition, Sec. 379.

Congress again in 1907 passed an Act directly pertaining to all noncompetent Indians, af follows:

> "Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty,**or who may have any interest in any allotment by inheritance,** may sell or convey all or any part of such allotment or such inheritance interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribed, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest under the Supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the Allottee."
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> Act of Congress, March 1st, 1907, c 2285, 34 Stat. 1018. U. S. Code Compact Edition, Sec. 405.

It is true that when this 80 acres of land in question was patented to the ancestor, Yaotes Owa, 1884, the patent was only subject to a five year restriction but it was not Yaotes Owa who executed the deed in question in this suit. It was Washington Pocatello, who the interest of the land came to by right of inheritance and who was at the time he executed the deed a non-competent Indian as expressed in the Act of Congress passed in 1907, last above quoted and in that section we

have stressed the following words "or who may have any interest in any allotment by inheritance."

This statute does apply to Washington Pocatello, deceased unless it is construed that the property inherited must come through only allotment and the statute does not apply in this case for the reason that the 80 acres in question was patented to the ancestor, Yaotes Owa, under the homestead law.

Turning now to the Act of Congress, May 27, 1902, that Act provides as follows: "'The adult heirs of the deceased to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such deceased, * * * *, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the Allottee * * * *."

The patent to Yaotes Owa was subject to restriction and the period of restriction may have expired before the death of Yaotes Owa, but Appellants cannot see how that removes the incompetency of Washington Pocatello that existed at the time he executed this deed.

It being admitted by respondents that Washington Pocatello was an incompetent at the time he executed the deed and a Ward of the Government being subject to the restrictions of such incompetency, how could he make a contract for the sale of land that he had inherit-

ed although it did lie outside of the confines of a government reservation, the said Washington Pocatello living on an Indian Reservation and subject to all the restrictions of inconpetency that could not be enforced in any court, against the provisions of the Act of Congress March 3, 1871, heretofore quoted and cited? which provided:

> "No agreement can be made by any person with any tribe of nations, or individual Indians not citizens of the United States for the payment of delivery or any money or any other thing of value, in present or prospective, * * * or procuring any privilege to him or to any other person in consideration of services for said Indian relative to their lands * * * ."

Appellants cannot conceive in the face of the fact that any person cannot go onto the Fort Hall Indian Reservation in Idaho and make any contract with any Indian living on that Reservation that has not received a certificate of competency, pertaining to any of the usual transactions of persons for the services of said Indians relative to their lands even though they might be on the reservation or make any contract with said Indians for the buying or selling of personal property that could be enforced in any court unless such contracts or agreements are executed before a judge of a court of record, and bear the approval of the Secretary of the Interior of Indian Affairs endorsed upon it as is provided in Sec. 2 of the Act of Congress, March 3, 1871, hereinbefore quoted and then turn around and say that in the case at bar that a white man could go

on the Reservation and secure from Washington Pocatello a contract for sale for a valuable tract of land for a very unjust and a inadequate price and that contract is enforcible in any court by virtue of the fact that he inherited the land from Indian ancestors and that the land lay outside the Reservation and no restrictions of alienation run with the land.

The Supreme Court of the State of Utah, in the conclusion of the second last paragraph of its decision said:

> "As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been — if at all applicable—complied with."

In answer to that finding of the Supreme Court this is enaction to quiet title, it is admitted by the court that the deed in question was placed in escrow and the fact that it was in escrow was published to the world and the judgment roll in the case shows the delivery of the deed very much in question and the Appellants being Indians the burden was upon the respondents to prove that the deed was valid and validly delivered and it was the duty of the Court of Utah to have before it sufficient proof that the deed was valid and a valid delivery of the deed and that it was in the furtherance of justice before they adopted the fiction of relation back.

Courts have repeatedly held that a restricted Indian cannot convey property by his individual Deed.

Authorities Cited

"Restricted Indians cannot transfer property prior to the termination of their restrictions.

"The plaintiffs undertake to avoid this inescapable conclusion from the authorities, by claiming that restricted Indians cannot by any devise transfer property prior to the termination of their restriction. **This is Settled Law."**

Staley vs Espenlaub, et al., 36 Fed. 2d, 91.

As the Same effect are the following decisions:

Goodman vs Buffalo (8C. C. A.); 162 Fed. 817.
Beck vs Floumoy, 65 Fed. 30.

Sheldon vs Dunbar, 40 Kan. 346; 19 P. 901.

The Supreme Court of the United States in the case of Wiggan vs Connelley, decided in 1896 as follows:

"This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor* allottee, that is, the limit of minority. And such limits must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right to add with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and of the tribe, and they could agree for still further protection, a protec-

tion which no individual was at liberty to challenge."

Wiggins vs Connelley, 163 U. S. 56: 16 Sup. Ct. 914; 41 L. Ed. 69.

Whether the deed executed by Washington Pocatello and Minnie Pocatello, his wife was a valid deed under the Statutes of the United States as herebefore set out and quoted, is a federal question that gives the Supreme Court of the United States Jurisdiction in this case is the contention of Appellants.

3. The District Court of the First Judicial District of the State of Utah in and for Box Elder County, Utah, has and did for a period of 25 years deny to the heirs of Washington Pocatello, deceased, the equal protection of the laws of the State of Utah, in violation of the Fourteenth Amendment of the Constitution of the United States and said Court has permitted a valuable property right to be taken from the heirs of the estate of Washington Pocatello, deceased, and given to residents of the State of Utah, without any just compensation to, or by personal act of the said Heirs, and without any due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The District Court in the case at Bar, found in its Finding No. 3 (Transcript 0316) "That Washington Pocatello died on or about the 27th day of April, 1917." The Supreme Court of the State of Utah in its decision in the closing words of the 3rd paragraph of its decision held as follows: "Washington Pocatello died April 27,

1917—less than three months after executing said deed—":

At the time of Washington Pocatello's death and at the present time under title WILLS AND SUCCESSION the State of Utah had a Statute, Sec. 6405 Civil Laws of the State of Utah, 1917, which at present is Sec. 101-4-2 that reads as follows, to-wit:

> "Property of Intestate Passes to Heirs Subject to Probate Proceedings.
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> "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration." (C. L. 17, Paragraph 6405.)

Also at the time Washington Pocatello died and at the time the property in question was decreed to his estate there was another Statute in the State of Utah, which reads as follows:

> "Specific Performance of Decedents Contract.
> "When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignments, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may

make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto. (C. L. 17, 7741.)

Sec. 102-11-26. Revised Statutes of Utah, 1933.

There is no Probate Court in the State of Utah, all Probate Matters are administered by the District Court, in the Probate Division, Section 102-1-6; Revised Statutes of Utah, 1933. Civil Laws, Section 7558, 19 17, Provides:

Powers of Courts and Judges—Code of Civil Procedure Applicable.

The District and Supreme Courts and the Judges sitting in probate and guardianship matters as such exercise all such powers consistent with the provisions of this title as or may be conferred upon those courts or judges respectively in other proceedings; and except as otherwise provided in this title, the provisions of the code of civil procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings.

In the case at Bar, it is admitted and found by the Trial Court and the Supreme Court of Utah, that Washington Pocatello, died on or about the 27th day of April, 1917. Under the Statute of Utah, Sec. 101-4-2, Revised Statutes of Utah, 1933, (Sec. 6405 Civil Laws

1917) whatever interest Washington Pocatello, had in the 80 acres in question in the State of Utah, passed immediately upon his death to his heirs, subject to administration by the District Court of Utah. The Judgment Roll in the case at bar, establishes that about 17 months after the death of Washington Pocatello, the District Court of Box Elder County, Utah, decreed to the estate of Washington Pocatello this undivided one-third interest in the 80 acres of land in question, which decrees created in the heirs of the estate of Washington Pocatello, deceased, the highest muniment title subject to administration by the said District Court of Box Elder County. The District Court record, in the Matter of the Estate of Washington Pocatello, deceased, shows, and the District Court Judge who heard this case has found, that a previous Judge, of said District Court, did on the 12th day of January, 1920, appoint one Charles E. Foxley, Administrator of the Estate of Washington Pocatello, deceased, in Box Elder County, Utah; that said Administrator failed to take any steps to recover the alleged undivided one-third interest in said 80 acres of land from A. I. Grover, (See Finding No. 15, transcript 0139) and therein the closing part of said Finding No. 15, the Trial Court said as follows:

> "That there was no evidence offered to the court as to the whereabouts of Charles E. Foxley and the Court finds that the proceedings in the Estate of Washington Pocatello were regular insofar as administered and that from January 12th, 1920, the date of the appointment of the said Charles E. Foxley to the date of the filing of complaint here-

in the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate."

(Last part of Finding No. 15, transcript 0320).

Appellants believe that it will be accepted without argument or authority, that the proper administration of the estates of deceased persons, and the protection of estates for deceased persons is the highest duty of any Court, and the District Court Record in the First Judicial District of the State of Utah, in and for Box Elder County, shows; that Letters of Administration on the Estate of Washington Pocatello, deceased, was on the 12th day of January, 1920, issued out of said Court to Charles E. Foxley, and that on that date the said Charles E. Foxley, ascribed to the oath of office as such Administrator, filed the bond required and qualified as such Administrator, and the District Court proceedings, in the estate of Washington Pocatello, deceased, shows that no Inventory in the estate of Washington Pocatello, deceased, was ever filed in said District Court by the said Administrator. The said District Court record in said estate shows that on the 3rd day of March, 1921, that the said Charles E. Foxley, as Administrator of said estate, filed in the District Court, a Final Account and Petition for Settlement thereof, reciting in said account that he had received from the First National Bank of Pocatello, Idaho the proceeds of a Land Contract of Sale by deceased and wife, in the sum of $995.00 setting forth a brief description of the property as follows:

"The property described in the petition for letters and described as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East 1/2 of S. E. 1/4 of Section 12, Tp. 11 N. R. 3 west S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

Reporting to District Court, that he had on hand the sum of $995.00 belonging to said estate, and there was due him, the Administrator as an Attorney Fee the sum of $504.00 leaving a balance for the heirs of the Estate of Washington Pocatello, deceased the sum of $491.00 to be distributed between them, and the proceedings in said estate shows that the said Administrator at the same time filed a petition of distribution asking the Court, to distribute this sum among the heirs, and the same time the Administrator prayed the Court to fix a date for hearing on his final account, and petition for distribution, for the approval and settlement of same. That the Clerk of said Court did fix the 14th day of March, 1921, at 10 o'clock A. M., at the Court House, in the Court Room, of said Court, in Brigham City, Box Elder County, Utah as the time and place for settlement of final account and for hearing petition for final distribution, for the 14th day of March, 1921. That on or about the 14th day of March, 1921, an objection to the allowing of the Account of Charles E. Foxley, the Administrator was filed in said cause, in said District Court, protesting to the Court

that no Inventory had been filed in said estate, and also protesting to the Court that the item of $497, Attorney Fees that the said Charles E. Foxley was claiming was unreasonable, and prayed that said account be not allowed or settled. The District Court of Box Elder County, Utah, never took any action on the account, petition of distribution, or the protest on the date set by the Clerk for hearing on the same, except the District Judge of said Court, postponed and continued the date of hearing from time to time, fixing the last day for a hearing as of January 13th, 1922, but on that date the Court held no hearing, and made no order continuing the matter to any other date, and the Judge sitting as District Judge in that Court, and all his successors, including Judge Lewis Jones, the Judge who heard the case, failed, refused and neglected to hold a hearing on the Final Account and Petition for distribution, or consider any matter in the estate of Washington Pocatello, deceased, until this suit was filed.

That owing to said District Court, failing, refusing and neglecting to do its duty, and hold a hearing on the Final Account and Petition for Distribution, as is provided by the Probate Code of the State of Utah, and properly and legally either, approving or disapproving, the said final account, and making a decree of distribution, if such was justifiable, and settling the estate according to law, the said Court failed, refused and neglected to take any action in the matter whatsoever, and thereby permitted and allowed the administrator to take to himself and keep all of the $995.00 received from the Bank, and thereby, took from these Indian heirs, even the paltry sum that U. F.

Diteman and A. I. Grover paid the Escrow Holder for the deed. And after 20 years of the courts denial to these heirs of the equal protection of the probate code laws of the State of Utah, the District Judge of the same District Court, places all the blame on these ignorant Indians, non-residents of the State of Utah, as appear from its Finding, No. 17 (transcript 0320) which reads as follows:

> "The Court finds that on December 3rd, 1919, when Petition for Letters of Administration was filed in the Estate of Washington Pocatello, deceased, that Ray Pocatello was then of the age of seven years, and all of the heirs of Washington Pocatello were older than Ray and at the time of filing of the petition herein that Ray Pocatello was of, the age of twenty-six; that the plaintiffs all knew of the fact that Charles E. Foxley was appointed administrator of said estate during all times from January 12th, 1920, to the date of filing of their complaint herein, and during all of said times these plaintiffs and Charles E. Foxley as administrator of said estate knew that A. I. Grover and these defendants claimed said eighty acres of land and all time had constructive knowledge that the said deed of Washington Pocatello and Minnie Pocatello, his wife placed in escrow with the First National Bank of Pocatello, Idaho, had been delivered and had been regularly recorded and all of the plaintiffs knew all of the facts complained of in their complaint herein at all times after or about November 1st, when Minnie Pcatello and her children appeared in open court

as set out in paragraph 18 of plaintiff's complaint as will more fully hereafter appear.

Finding 18 reads as follows: (transcript 0321)

"That Minnie Pocatello and four of her children appeared in Court on or about November 1st, 1919, at the time of the hearing on Petition for Settlement of the Account and Distribution in the Estate of Yaotes Owa, deceased; that at said time Judge D. Call then Judge of the Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that a conference was had between said parties and the plaintiffs herein and their mother then signed a request in the matter of the estate of said Washington Pocatello, deceased, requesting the Court to appoint Charles E. Foxley as administrator of said estate, the said request it attached to and made a part of the Petition of Letters of Administration in the Estate of said Washington Pocatello, deceased; that pursuant to said request and after due and legal notice said Charles E. Foxley was as heretofore found, duly and regularly appointed administrator of said estate and thereafter qualified and Letters of Administration were issued to him and that said letters have never been revoked; that in the summer of 1921 Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley had re-

ported he had $995.00 belonging to the Estate of Washington Pocatello and that after deducting attorney's fees and costs there was left about $490.00 for the heirs of, the exact manner of acquiring said money being not explained to said parties; that said Superintendent Donner advised said heirs he did not approve of said settlement of said estate without knowing more about it and spoke something about having the matter investigated; that several months later that said heirs were informed from the Superintendent's office that nothing further could be done in the matter; that at different times thereafter said heirs appealed to said Superintendents office to make investigation of the settlement, but they were always told that nothing could be done; that said heirs did nothing further in said matter until the death of Minnie Pocatello when the heirs sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took no further action until the filing of the complaint herein."

The Trial Court also found in Finding No. 20. (transcript 0321) as follows:

That the physical conditions and improvements on said 80 acres of land have remained practically unchanged since the court decreed the property to the heirs of Yaotes Owa, deceased, except the present owners and their predecessors in interest expended considerable time and money each year in leveling said land for intensive farming pur-

poses and said A. I. Grover purchased from the Utah-Idaho Sugar Company a water right for said premises which he paid the sum $3000.00; that said land was appraised in the Probate proceedings in this Court as having a value of $4900.00 which amount the Court finds was the reasonable cash market value of said premises at said time; that the defendants Amasa L. Clark and Joseph E. Robinson at the time they purchased said property in March, 1925, paid the sum of $12,500.00 which the Court finds was the fair cash market value of said property and that said A. I. Grover and the defendants Amasa L. Clark and Joseph E. Robinson have each year leased the said premises for cash rental."

Appellants have heretofore in this Statement inserted the Trial Courts Finding No. 15, (transcript 0139).

Notwithstanding these Findings of the Trial Court, showing what the Probate proceedings in the estate of Washington Pocatello, deceased, shows, yet the Trial Court and the Supreme Court of Utah, in order to make a title for the white persons, the defendants in this case, against the Indian heirs say that because these Indians have not shown to the satisfaction of the Trial Court that the full amount of the $3000.00 might not have been paid to the Escrow Holder, and because the Deed on its face showed a consideration of $3200.00 and the deed was filed of record, that the court is going to hold that the full amount was paid to the Escrow Holder and that the deed was rightfully delivered, and both the Trial Court and the Supreme Court invoked the fiction of "relation back," to the time of making

the deed so as to cut the heirs out of their inherited interest in the estate.

Appellants contend that the Supreme Court of Utah, by its decision in this case has denied to Appellants the protection of former decisions of the Court on similar facts.

The Supreme Court of Utah has held that the fiction of relation back can only be applied when it is shown that all conditions of an Escrow Agreement has been performed and then only in the furtherance of justice as held in the following cases:

> "There may be circumstances under which the deed placed in escrow, when all the conditions are performed, will relate back to the time of its execution, but this is the case only when justice requires that the doctrine of relation back be enforced. The title, therefore, remained in J. Y. Rich until respondents had complied with the conditions imposed upon him, namely until he had made the final payment and paid the taxes assessed against the property."
>
> Charles E. Foxley vs J. Y. Rich et al. 35 Utah, 162. 99. Pacific. 666.

This is an action to quiet title, and is an action in equity, and respondents prayed for equitable relief, that the title be quieted in them. Appellants contend that the Supreme Court by its former decisions has

held that in such cases, the Court is bound to determine all questions of law as well as fact, therefore the Court should not have striken Appellants Bill of Exceptions and should have taken judicial notice of the District Court record in the probate proceedings in the Estate of Washington Pocatello, deceased. Appellants quote the following cases from the State of Utah:

In Hargraves vs Burton, the Court said:

> "The controling question is, does the evidence disclosed by the record sustain the Trial Court?
>
> "(1) This is an action in equity in which it becomes our duty to determine questions of fact as well as of law.
>
> "(2) The lease to the property in question being admittedly in the plaintiff, the burden was upon the defendant to establish his equitable rights if any he had by a preponderance of the evidence."
>
> Hargraves vs Burton 59 Utah, 575, 206 Pac. 575, 33 L. A. R. 1481.

Appellants quote again from a case heretofore quoted; the same being a very recent case, wherein the Supreme Court said:

> "This being an equity case we are required to examine the evidence and determine the facts for ourselves."

Federal Land Bank of Berkley v Salt Lake Valley Sand and Gravel Company et al 85 Pac 2d, 791.

That decision was rendered on January 3rd, 1939, and the decision in the case at Bar on the 18th day of April, 1940, but the court makes no allusion to this being a case of equity, but holds that it can not even consider the District Court files in the probation of the Estate of Washington Pocatello, deceased, for the reason that they are part of the Bill of Exceptions, and because the Court struck said Bill the Court can not consider any of the facts disclosed by the evidence.

The Supreme Court of Utah has held as follows:

"Of what use are constitutional provisions respecting the rights of property if they may be disregarded by the courts."

Wheelright v Roman. 50 Utah, 10, 15 Pac. 513.

Appellants were and are incompetent under the Probate Code of the laws of the State of Utah, and required the special protection of the Courts of Utah. Section 102-13-20, Revised Statutes of Utah, 1933, Section 7817, Civil Laws of Utah, 1917, reads as follows:

"Incompetent" Ect., Defined.

"The words "incompetent," "mentally incompetent" and "incapable" as used in this title, shall

be construed to mean any person who though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable unassisted to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons".

This Statute certainly applies to and includes these Indians.

Wherefore Appellants respectfully submit, that this case does contain at least four Federal Questions that gives the United States Supreme Court Jurisdiction: First, that the Indians were denied the rights and privileges, extended to them by the Act of Congress, June 30, 1834, c 161, Sec 22, 4 Statute at Large, 763, R. S. Sec. 2126, by placing all burdens on the Indians even burdens that could not be placed on white persons. Second, that under the Statutes of the United States heretofore set out that Washington Pocatello and Minnie Pocatello could not execute a valid deed in the first place; Third, that Appellants have been denied the equal protection of the law, and that their property has been taken away from them against their will and without paying them any remuneration for the same, and not under due process of law, in violation of the rights guaranteed to them under the Fourteenth Amendment of the Constitution of the United States,

and Appellants respectfully request a hearing before the Supreme Court of the United States.

Decision of Supreme Court attached.

Dated this 18th day of August, 1941.

ROY L. BLACK,
Attorney for Petitioners admitted to practice before the Supreme Court of the United States.
Residence: Pocatello, Idaho.

P. C. O'MALLEY,
Attorney for Petitioners.
Residence: Pocatello, Idaho.

In The
Supreme Court of the State of Utah

Laura Morris, Special Administratrix Est. of Washington Pocatello, deceased, et al.,

Plaintiffs and Appellants,

v.

Amasa L. Clark, et al.,

Defendants and Respondents

No. 6248

Filed April 14

McDONOUGH, Justice:

Appeal from a judgment entered in the district court in favor of defendants and against plaintiffs. The action was brought in the lower court by the special adminis tratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, and their heirs to quiet title to a one-third interest in an eighty acre tract of land in Box Elder County, Utah, and for an accounting of the rents, issues and profits. Defendants, respondents here, denied the claims of plaintiffs, asserted full title to said tract in themselves, and prayed a decree quieting same as against plaintiffs. The trial court by its judgment dismissed plaintiff's complaint and granted defendants the relief prayed.

Heretofore, this court, by motion duly interposed by respondents, entered an order striking appellants' bill of exception. The case is, therefore, before us on the judgment roll and the assignments of error applicable

thereto. Nearly all of such assignments go to the sufficiency of the evidence to support the findings of the trial court. Those which require an examination of the stricken bill of exceptions we may not, of course, consider.

Plainttiffs' intestates were Shoshone Indians residing on the Fort Hall Indian Reservation in Idaho. The tract of land in question was not allotted land but was acquired by the ancestor of Washington Pocatello, one Yaotes Owa, through home-steading of the land and the issuance of patent from the United States. Yaotes Owa died in Box Elder County, Utah, in the late eighties. Probate proceedings on her estate were not commenced until 1917. By a decree of distribution made therein, November 7, 1919, a one-third interest in the 80 acre tract in question was decreed to Washington Pocatello. However, about February 2, 1917—more than two years prior to the date of said decree—the said Washington Pocatello and his wife, Minnie, entered into a contract to sell the eighty acre tract to one U. F. Diteman, predecessor in interest of respondents herein, for a consideration of $3200.00, payable $200.00 in cash with annual installments of $300.00 payable in December of each year, the last installment becoming due, therefore, in December 1926. A warranty deed reciting a consideration of $3200.00 was executed by Washington and his wife, Minnie, as sole heirs of Yaotes Owa, to the 80 acre tract, and said deed was deposited with the First National Bank of Pocatello, Idaho, as escrow depositary, to be held by it until the full purchase price was paid, and thereupon to be delivered to the grantee therein named. An affidavit

setting forth the terms of the agreement was executed by the cashier of the bank and filed of record in the office of the County Recorder of Box Elder County, Washington Pocatello died April 27, 1917—less than three months after executing said deed—and Minnie, his wife, died May 28, 1928.

On January 12, 1920, one Charles E. Foxley was appointed administrator of the Estate of Washington Pocatello. The deed placed in escrow, as hereinabove recited, was on November 10, 1919 filed of record with the County Recorder of Box Elder County, having been theretofore delivered by the escrow holder to an agent of the grantee therein named.

At the time of the trial, the First National Bank of Pocatello, Idaho, had been liquidated. Foxley, the administrator of the Estate of Washington Pocatello had long since left the jurisdiction of the court. However, it appears from the pleadings that some time after his appointment as administrator and after the date when the deed was recorded, Foxley reported to the probate court that he had received $995.00—property of the estate—from the First National Bank of Pocatello, Idaho. This report was never passed upon by the court.

By their pleadings, in addition to setting forth the facts hereinabove recited, plaintiffs alleged that the deed placed in escrow was delivered by the depositary upon payment of only $1,000 of the consideration recited therein and agreed to be paid, that defendants had full knowledge of such facts when they purchased

the premises and hence were not bona fide purchasers thereof. Upon these issues the trial court found in favor of defendants and against plaintiffs. On the issue of payment vel non of the full consideration to the depositary before the delivery by it of the deed, the court made the following finding:

> " . . . that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent . . . "

Despite the striking of their bill of exceptions, appellants argue that such finding is not supported by the evidence. They contend that by the admissions in defendants' pleadings that Foxley, Administrator, had reported in the estate proceedings the receipt of only $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank hereinabove adverted to, setting forth the terms of the escrow was placed of record, plus the record of the probate proceedings in the Estate of Washington Pocatello—of which though contained in the stricken bill of exceptions they contend we must nevertheless take judicial notice—it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we cannot agree. The report of

the administrator was never heard or passed on by the probate court. We cannot say that it necessarily spoke the truth with respect to the amount received by the administrator from the bank, nor that the report establishes that the bank delivered to him the total amount paid by the grantee in the deed, especially since the stricken bill may contain evidence which precludes any inference whatever which might possibly be drawn therefrom.

Appellants make the further contention that even though the condition of the escrow was fully performed at the time of the delivery of the deed, nevertheless since delivery was made subsequent to the death of Washington Pocatello, it was an invalid delivery, and passed no title—the death of the principal revoking the authority of the agent depositary. They cite 2 C.J.S. 1174 which discusses the rule that an agent's authority is ordinarily terminated by the death of his principal. However, this text and the cases there cited have no application to an escrow depositary. The rule with respect thereto is correctly stated at p. 878 of 21 C.J. as follows:

> "Until the escrow contract has been made, the depositary has no rights or authority enforceable at Law, but when it has been made and the instrument deposited, he becomes the agent of both parties, and the death of a party prior to the performance of the condition, does not affect the depositary's obligation to perform the duties

> imposed upon him by the escrow contract. When the condition upon which the instrument is to take effect is performed, the depositary becomes a mere agent or trustee of the grantee and his possession is equivalent to possession by the grantee."

See also, 7 Thompson on Real Property, Permanent Edition, Sec. 4205, p. 679.

Argument is made, in favor of appellant's title, to the effect that by the decree determining heirship and of distribution in the estate of Yaotes Owa there was distributed to the estate of Washington Pocatello a one-third interest therein, and that such decree establishes title of the heirs. Further, that title to such interest having vested in the heirs of Washington Pocatello upon the latter's death, it could thereafter be divested only by the act of the heirs themselves or by decree of a competent court. But all this disregards the escrow deed executed by the heirs' intestates and the finding of the court that the agreed purchase price was paid to the escrow holder at the time of delivery of the deed. Under such findings by virtue of the doctrine of relation back of title to the time of delivery of the deed (which we consider applicable under the facts as found by the trial court), in effect, no interest vested in the heirs or in his estate. Should Washington Pocatello have lived until the date of the decree of distribution in the Estate of Yaotes Owa, and the

court have then decreed to him the one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the court would merely confirm the title thereto warranted in the deed. The same result is effected by delivery upon performance of the conditions after death of the grantor.

Appellant questions whether Washington and Minnie Pocatello, being Indian wards of the government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under Congressional enactment, there were restrictions upon alienation, had long since passed at the time of the transaction. As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been—if at all applicable—complied with.

In view of our holding that we may not on the record before us disturb the finding of the trial court to the effect that there was full compliance with the condition of the escrow before delivery of the deed to the grantee therein, it becomes unnecessary to discuss the court's holding that plaintiff's action was barred by the statue of limitations or to consider the question discussed in appellants' briefs relative to whether defendants were innocent purchasers for value, as

found by the trial court, or whether such purchaser from a grantee who wrongfully obtained a deed deposited in escrow is vested with title.

The judgment of the district court is affirmed. Costs to respondent.

WE CONCUR:

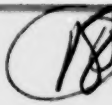
DAVID W. MOFFAT,
Chief Justice

JAMES H. WOLFE,
Justice

MARTIN M. LARSON,
Justice

EUGENE E. PRATT,
Justice

Rehearing denied on July 16, 1941



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 736

LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, Both Deceased, et al.,

Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

William J. Lowe,
Dean F. Brayton,
Counsel for Appellees.

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